

RETURN RECEIPT REQUESTED

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Russell Harding, Director
Michigan Department of Environmental Quality
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Lansing, Michigan 48909-7973

Re: EPA File No. 5R-98-R5 (Select Steel Complaint)

Dear Fr. Schmitter, Sr. Chiaverini, and Mr. Harding,

On August 17, 1998, the Office of Civil Rights (OCR) accepted for investigation an administrative complaint filed on June 9, 1998 by Father Phil Schmitter and Sister Joanne Chiaverini pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq. (Title VI), and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint alleges that the Michigan Department of Environmental Quality's (MDEQ) issuance of a Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) permit to the Select Steel Corporation of America for a proposed steel recycling mini-mill in Genesee Township would lead to a discriminatory impact on minority residents and that the MDEQ permitting process was conducted in a discriminatory manner. In addition to the allegations contained in the complaint filed with OCR, the Complainants also submitted written information regarding alleged discrimination related to the permitting of the proposed Select Steel facility in an April 22, 1998 letter from Fr. Schmitter and Sr. Chiaverini to the Sugar Law Center, an April 29, 1998 letter to David Ullrich, Acting Regional Administrator for Region V, and a June 9, 1998 petition to EPA's Environmental Appeals Board (EAB).

Title VI prohibits discrimination based on race, color, or national origin under programs or activities of recipients of federal financial assistance. EPA has adopted Title VI implementing regulations that prohibit unjustified discriminatory *effects* which occur under federally-assisted programs or activities. 40 C.F.R. Part 7. Discrimination can result from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless they are justified and there are no less discriminatory alternatives.

MDEQ is a recipient of EPA financial assistance; therefore, MDEQ is subject to the requirements of Title VI and EPA's implementing regulations. Section 7.35(b) prohibits recipients from administering their programs in a manner that would have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Section 7.30 of EPA's Title VI regulations provides that no person may be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin.

The June 9, 1998 Title VI complaint filed with OCR refers generally to the "unfair and disparate burden of pollution [which] will fall on a group of minority . . . people." However, in other information provided to EPA in writing and during interviews, the Complainants also raised specific concerns about the facility's potential emissions of volatile organic compounds (VOCs), lead, air toxics, and dioxin.

As previously mentioned, OCR accepted the complaint for investigation in August 1998, and has completed its review of the allegations raised. In analyzing the Complainants' concerns regarding air quality and public health effects, EPA has determined that this facility would not pose an "adverse" effect on the community. In this case, EPA did not base its finding on whether the effects would be disparate since the effects did not rise to the level of "adverse." After reviewing all the facts in this case, OCR has found that neither the Complainants' concerns regarding air quality nor those regarding the opportunity for public participation rise to the level of a discriminatory effect within the meaning of Title VI and EPA's implementing regulations. Therefore, OCR dismisses Complainants' allegations in this case. The basis for this determination is explained below.

The Investigation

EPA investigated this matter consistent with its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Interim Guidance). EPA has attempted to conduct this investigation expeditiously, taking into account the need for certainty in the regulatory process associated with permitting new facilities, while at the same time seriously reviewing the concerns expressed by the Complainants.

EPA's ability to expeditiously render this decision was facilitated significantly by the record of decision developed by the State in this case. In addition, analyses of the kind credibly undertaken by the State to address concerns raised during the permitting process not only substantially enhance the probability that State-issued permits will withstand scrutiny under Title VI, but also enables expeditious processing by EPA of administrative complaints filed under Title VI. Such analyses early in the permitting process may also facilitate the State's early identification and development of possible solutions to address potential Title VI concerns.

Alleged Discriminatory Effect Resulting from Air Quality Impacts

As outlined in EPA's *Interim Guidance*, EPA follows five basic steps in its analysis of allegations of discriminatory effects from a permit decision. "The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity." *Interim Guidance* at 8. If there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations. In order to address the allegation that MDEQ's issuance of a PSD permit for the proposed Select Steel facility would result in a discriminatory effect, EPA first considered the potential adverse effect from the permitted facility using a number of analytical tools consistent with EPA's *Interim Guidance*. It is important to note that EPA believes that the evaluations of adverse, disparate impact allegations should be based upon the facts and totality of the circumstances each case presents.

VOCs

To evaluate the impact of VOCs, EPA examined the permit application submitted by Select Steel and a variety of analyses conducted by MDEQ. With that information, EPA considered VOCs in their role both as precursors to ozone and, for some VOCs, as toxic air pollutants (see discussion below concerning air toxics). In examining VOCs as ozone precursors, EPA studied the additional contribution of VOCs from the proposed Select Steel facility and has determined those emissions will not affect the area's compliance with the national ambient air quality standards (NAAQS) for ozone.

The NAAQS for ozone is a health-based standard which has been set at a level that is presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area; therefore, there is no affected population which suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations associated with VOCs as ozone precursors.

The Complainants also have alleged that failure to require immediate VOC monitoring for the proposed Select Steel facility will result in a discriminatory effect. Select Steel's permit condition regarding VOC monitoring allows Select Steel one year from plant start-up to

implement a continuous emissions monitoring system (“CEMS”) for VOCs. MDEQ is not required to prescribe immediate VOC monitoring because EPA’s regulations allow the permitting authority to impose post-construction monitoring as it “determines is necessary.” 40 C.F.R. § 52.21(m)(2). As discussed above, there would be no affected population that suffers “adverse” impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For this reason, EPA finds that, with regard to VOC monitoring, MDEQ did not violate Title VI or EPA’s implementing regulations.

Lead

Similarly, to evaluate potential lead emissions from the facility, EPA studied the additional contribution of airborne lead emissions from the proposed Select Steel facility and has determined those emissions will not affect the area’s compliance with the NAAQS for lead. As with ozone, there is a NAAQS for lead that has been set at a level presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the attainment area. Therefore, there would be no affected population which suffers “adverse” impacts within the meaning of Title VI resulting from the incremental lead emissions from the proposed Select Steel facility. Accordingly, EPA finds no violation of Title VI or EPA’s implementing regulations.

In this case, MDEQ also appropriately considered information concerning the effect of the proposed facility’s lead emissions on blood lead levels in children in response to community concerns. EPA reviewed this information along with other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility. EPA considered this additional information in response to the Complainants’ concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. Overall, EPA found no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by emissions from the proposed facility. Furthermore, EPA concurs with the State’s finding that lead emissions from the proposed Select Steel facility would have at most a *de minimis* incremental effect on local mean blood lead levels and the incidence of elevated levels.

Air Toxics

For airborne toxics, EPA conducted its review based on information presented in the permit application, existing TRI data, and MDEQ documents. EPA reviewed MDEQ’s analysis of Select Steel’s potential air toxic emissions for evidence of adverse impacts based on whether resulting airborne concentrations exceeded thresholds of concern under State air toxics regulations. EPA also considered the potential Select Steel air toxic emissions together with air toxic emissions from Toxics Release Inventory (TRI) facilities, the Genesee Power Station, and other major sources in the surrounding area. EPA’s review of air toxic emissions from both the proposed site alone, as well as in combination with other sources, found no “adverse” impact in

the immediate vicinity of the proposed facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations.

Dioxin

The information gathered from the investigation concerning the monitoring of dioxin emissions is consistent with EAB's analysis of the issue.¹ No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect associated with MDEQ's decision not to include monitoring requirements for dioxin and that MDEQ did not violate Title VI or EPA's implementing regulations.

Alleged Discriminatory Public Participation Process

To assess the allegations of discrimination concerning public process, EPA evaluated the information from interviews with Complainants and MDEQ, and from documents gathered from the parties. The first allegation was that the permit was "hastily sped through" by MDEQ to avoid permitting requirements (*i.e.*, conduct a risk assessment; provide opportunity for public comment on risk assessment; provide meaningful opportunity for all affected parties to participate in the permit process) imposed by a State trial court that are under appeal. The five months between receipt of the complete permit application and permit approval is actually slower than the average time of one and a half months for the past twenty-six PSD permits approved by MDEQ. EPA's review found that the public participation process for the permit was not compromised by the pace of the permitting process. MDEQ satisfied EPA's regulatory requirements concerning the issuance of PSD permits.

The Complainants also alleged that the relationship between an employee of Select Steel's consultant who is a former MDEQ employee and MDEQ led to improprieties in the permitting process. Neither the documents nor the interviews revealed any improper or unlawful actions by MDEQ and Select Steel's consultants during the permitting of Select Steel. Without any such evidence, EPA cannot find any impropriety existed that contributed to an alleged discriminatory process.

¹ In the EAB's analysis of Complainants' PSD appeal concerning monitoring of dioxin, the Board similarly concluded that "MDEQ's decision is not clearly erroneous." *In re Select Steel Corporation of America*, Docket No. PSD 98-21, at 5 (EAB Sept. 10, 1998). That holding was based, in part, on the fact that the Complainants made "no argument and points out no data to refute MDEQ's judgment." *Id.*

The Complainants alleged that the manner of publication of the notice of the permit hearing also contributed to the alleged discriminatory process. The Complainants allege that publication in newspapers was insufficient to inform the predominantly minority community because few community members have access to newspapers -- something the Complainants allege was brought to MDEQ's attention during the permitting process for another facility in Genesee Township. EPA's regulations for PSD permitting require that notice of a public hearing must be published in a weekly or daily newspaper within the affected area. 40 C.F.R. § 124.10(c)(2)(i). In this case, MDEQ went beyond the requirements of the regulation and published notices about the hearing in three local newspapers.

Complainants also state that MDEQ's failure to provide individual notice of the hearing to more members of the community also contributed to the alleged discriminatory process. In addition to newspaper notice, EPA's regulations require that notice be mailed to certain interested community members. 40 C.F.R. § 124.10(c)(1)(ix). MDEQ mailed hearing notification letters a month in advance to Fr. Schmitter, Sr. Chiaverini, and nine other individuals in the community who had expressed interest in the Select Steel permit -- an action which is consistent with the requirements of EPA's regulations. The mailing list that MDEQ developed was adequate to inform the community about the public hearing, in part, because the Complainants took it upon themselves to contact other members of the community.

The Complainants also alleged that the location of the public hearing (Mount Morris High School) made it difficult for minority members of the community to attend. Complainants felt that the hearing should have been held at Carpenter Road Elementary School. Both schools are approximately two miles from the proposed Select Steel site; however, the elementary school is located in a predominantly minority area, while the high school is in a predominantly white area.² MDEQ explored other possible locations and chose the high school, among other reasons, because of its ability to accommodate the expected number of citizens and its close proximity to the proposed site. The high school also is accessible by the general public via Genesee County public transportation.

For all of these reasons, EPA finds that the public participation process for the Select Steel facility was not discriminatory or in violation of Title VI or EPA's implementing regulations.

Conclusion

After reviewing all of the materials submitted and information gathered during the investigation, EPA has not found a violation of Title VI and EPA's implementing regulations.

² No concerns were raised about the manner in which the public hearing itself was conducted. *See Telephone Interview with Complainants (September 17, 1998).*

Accordingly, EPA is dismissing the complaint as of the date of this letter. Please note that the closure of this case does not affect your right to file a complaint with OCR in the future.

Although EPA has dismissed this complaint, we believe that the Complainants raised serious and important issues that merited a careful review. To the extent the Complainants have identified general concerns about pollution in their community, including existing elevated blood lead levels in children, EPA encourages the State to continue activities to address these concerns. EPA is available to provide technical assistance in these efforts. EPA also encourages the State to continue working with this community to improve understanding of regulated activities in their local environment and the Agency is available to facilitate these efforts should the parties so desire.

More broadly, EPA believes that many of the issues raised in the context of Title VI administrative complaints could be better addressed through early involvement of affected communities in the permitting process. Such consultations will better ensure that communities are fairly and equitably treated with respect to the quality of their environment and public health, while providing State and local decision makers and businesses the certainty they deserve.

In conclusion, please be aware that Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected under Title VI. 40 C.F.R. § 7.100. Any individual alleging such harassment or intimidation may file a complaint. 40 C.F.R. § 7.120(a). The Agency would seriously consider and investigate such a complaint if warranted by the situation.

Furthermore, under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that we receive such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

Sincerely,

Ann E. Goode
Director

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**U.S. Environmental Protection Agency
Office of Civil Rights**

INVESTIGATIVE REPORT

for

**Title VI Administrative Complaint File No. 5R-98-R5
(Select Steel Complaint)**

I. INTRODUCTION

On August 17, 1998, the United States Environmental Protection's ("U.S. EPA") Office of Civil Rights ("OCR") accepted for investigation an administrative complaint filed on June 9, 1998 by Father Phil Schmitter and Sister Joanne Chiaverini against the Michigan Department of Environmental Quality ("MDEQ") pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq. ("Title VI"), and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint alleged that MDEQ's issuance of a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit to the Select Steel Corporation of America for a proposed steel recycling mini-mill in Genesee County would lead to a discriminatory impact on minority residents and that the MDEQ permitting process was conducted in a discriminatory manner. *See* Letter from Fr. Phil Schmitter and Sr. Joanne Chiaverini, Co-Directors, St. Francis Prayer Center, to Diane [sic] E. Goode, Director, US EPA OCR (June 9, 1998) ("Title VI Complaint").³

In addition, Fr. Schmitter and Sr. Chiaverini provided information in an earlier letter to Kary Moss of the Maurice & Jane Sugar Law Center. Letter from Fr. Schmitter and Sr. Chiaverini to Kary Moss (April 22, 1998). That letter was transmitted to the EPA and it expressed a number of concerns over the proposed Select Steel facility.

Fr. Schmitter and Sr. Chiaverini also submitted information regarding alleged discrimination in an earlier letter to EPA Region V. Letter from Fr. Schmitter and Sr. Chiaverini to David Ullrich, Acting Regional Administrator, EPA Region V (April 29, 1998) ("April 29th Letter"). This letter enclosed the testimony that Fr. Schmitter and Sr. Chiaverini provided to MDEQ at its April 28, 1998 public hearing on the proposed Select Steel permit. On May 15, 1998, David Ullrich forwarded the April 29th Letter to EPA because it expressed concerns about Title VI matters which are the responsibility of EPA to resolve.

Fr. Schmitter and Sr. Chiaverini also alleged that MDEQ violated Title VI in a June 9, 1998 petition to EPA's Environmental Appeals Board ("EAB"). Letter from Fr. Schmitter and Sr. Chiaverini to EAB (June 9, 1998) ("EAB Petition"). The EAB denied review of the Title VI claim on jurisdictional grounds citing EPA's responsibility for ensuring Agency compliance with Title VI. *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (Sept. 10, 1998) ("EAB Decision"). The EAB also denied review of the other claims regarding the alleged deficiencies of the Select Steel permit because the petition identified neither clear error in MDEQ's decision making processes nor an important policy consideration that justified EAB review. 40 C.F.R. § 124.19(a).

³ The complaint filed by Fr. Schmitter and Sr. Chiaverini is supported by the community group Flint-Genesee United for Action, Justice, and Environmental Safety. Letter from Lillian Robinson, President, and Janice O'Neal, Spokesperson, Flint-Genesee United for Action, Justice, and Environmental Safety, to Patrick Chang, U.S. EPA (August 1, 1998); Telephone Interview with Fr. Schmitter, Sr. Chiaverini, and Ms. O'Neal (Sept. 17, 1998).

The MDEQ has received, and continues to receive, EPA financial assistance and, therefore, is subject to the requirements of Title VI and EPA's implementing regulations.⁴

⁴ The \$2.3 million in air grants for FY98 were awarded by EPA to MDEQ via grant A005711-98 (awarded on Sept. 30, 1997). There were three amendments: A005711-98-1 (Feb. 3, 1998); A005711-98-2 (April, 24, 1998); and A005711-98-3 (Sept. 21, 1998).

II. ALLEGATIONS

A. Allegation Regarding Air Quality Impacts

In the Title VI Complaint, Fr. Schmitter and Sr. Chiaverini allege that MDEQ's issuance of the Select Steel permit will result in "grievous discriminatory effects" and that a "disparate burden of pollution will fall upon a group of minority . . . people." Title VI Complaint at 1.

In their April 29th letter, Fr. Schmitter and Sr. Chiaverini stated they were sending the information "out of deep concern that another Title VI Civil Rights Violation is in the making, as the Michigan Department of Environmental Quality rushes to grant" the Select Steel permit in an "area near high concentrations of minority . . . residents." In that same letter, Fr. Schmitter and Sr. Chiaverini request relief from "the disregard the MDEQ has for considering high concentrations of minorities around potential sources of pollution."

In their EAB petition, Fr. Schmitter and Sr. Chiaverini make the general allegation that MDEQ's decision to grant this permit violates Title VI of the Civil Rights Act because "the vast majority of the people within 3 miles of the proposed site are minority Americans and will be burdened with a disparate impact of pollution in an already deeply polluted area." EAB Petition at 1.

In the testimony enclosed in the April 29th Letter, in their EAB petition, and during EPA's September 17th and 29th interviews, Fr. Schmitter and Sr. Chiaverini raised the following concerns about the disparate impact resulting from specific potential emissions from the proposed Select Steel facility:

1. volatile organic substances ("VOCs") (April 29th Letter, EAB Petition, Interview with Fr. Schmitter, Sr. Chiaverini, Ms. O'Neal, in Flint, MI (Sept. 29, 1998));
2. lead, including the effect of increased emissions will have on the children of Flint (April 29th letter, EAB Petition, Interview with Complainants (Sept. 29, 1998));
3. manganese (Interview with Complainants (Sept. 29, 1998));
4. mercury (Interview with Complainants (Sept. 29, 1998)); and
5. dioxin (April 29th letter, EAB Petition, Interview with Complainants (Sept. 29, 1998)).

B. Allegation Regarding Discrimination in Public Participation

1. Timing of permit issuance

Complainants felt that the permit was “hastily sped through, and shepherded by the DEQ permit process” to avoid a potentially adverse decision in ongoing litigation over another facility in the area, the Genesee Power Station (“GPS”).⁵ Title VI Complaint. In the GPS case, MDEQ appealed a trial court’s order that (1) a risk assessment must be performed before a major air pollution source may be permitted, (2) notice of the risk assessment and an opportunity to comment must be provided, and (3) all affected parties must be given a meaningful opportunity to participate in the permit process. *NAACP-Flint Chapter v. MDEQ*, No. 95-38228-CV (Mich. Cir. Ct. Genesee Cnty. July 28, 1997) (order granting plaintiffs’ motion for a permanent injunction). Complainants in the Select Steel case, then, argued that MDEQ issued the PSD permit to Select Steel on an expedited basis to avoid having to perform those tasks in the event the Court of Appeals upheld the trial court’s decision. *See* Title VI Complaint; Interview with Complainants (Sept. 29, 1998).

They indicated that the initial news about the proposed Select Steel facility came from an article published in The Flint Journal on December 6, 1997. Tom Wickham, *Steel Mill Eyes Local Site*, The Flint Journal (December 6, 1997). The story raised some concerns for the Complainants, so in January or February 1998, they contacted MDEQ’s Thermal Process Unit Supervisor. During the course of that conversation, Complainants allege that the Supervisor said that the Select Steel permit process would take “a long time.” Based on that conversation, Complainants felt that MDEQ misled them into thinking it would be at least a year until the permit was issued, but it was ultimately issued four months later, on May 27, 1998, shortly before the June 9, 1998 oral argument in the GPS case.

2. Relationship Between Select Steel and MDEQ

Complainants also believed that the integrity of the permitting process was compromised because Select Steel retained Dhruman Shah, a former MDEQ employee, as their consultant. From 1979 to 1995, Mr. Shah was employed by MDEQ in various positions in which he reviewed permit applications for compliance with state and federal requirements. After leaving MDEQ, Mr. Shah became a Senior Project Engineer for NTH Consultants, Ltd. Select Steel hired NTH Consultants to prepare and submit their PSD application to MDEQ. NTH Consultants, in turn, selected Mr. Shah as one of its engineers on the Select Steel project. Complainants felt that the relationship

⁵ Flint-Genesee United for Action, Justice, and Environmental Safety, and the NAACP-Flint Chapter filed an action in the Circuit Court for the County of Genesee against MDEQ concerning the issuance of a permit for the construction of GPS, a wood waste fired steam electric plant. MDEQ appealed. The Michigan Court of Appeals accepted the case and a stay of the Circuit Court’s decision was issued. *NAACP-Flint Chapter v. MDEQ*, No. 205-264 (Mich. Ct. App. Oct. 2, 1997) (ordering stay of permanent injunction pending outcome of appeal).

between Select Steel's consultant and MDEQ led to some improprieties in the permitting process. *See Telephone Interview with Complainants (Sept. 17, 1998).*

3. Notice of Public Hearing

In addition, Complainants raised issues about the notice for the public hearing on the Select Steel permit application conducted by MDEQ. MDEQ published notices about the public hearing in *The Flint Journal* on March 27, 1998 and March 28, 1998, in *The Suburban News* on March 29, 1998, and in *The Genesee County Herald* on April 1, 1998. Complainants felt that notifications published in newspapers were not sufficient to inform their community about the public hearing. Complainants stated that few members of their community receive newspapers because they cannot afford to subscribe and because no one would deliver the newspapers to those areas. Moreover, Complainants alleged that MDEQ was aware of the insufficiency of newspaper notice because Complainants noted that members of the community did not have ready access to newspapers during the course of the GPS litigation. *See Telephone Interview with Complainants (Sept. 17, 1998).* Consequently, Complainants felt that MDEQ should have done more to notify the community about the public hearing. *See id.*

MDEQ mailed letters to some members of the community, including Fr. Schmitter and Sr. Chiaverini, notifying them about the public hearing. Complainants argued that MDEQ should have conducted a broader mailing that encompassed larger portions of the community. *See id.*

4. Location of Public Hearing

Complainants also alleged that the location of the public hearing made it difficult for minority members of the community to attend. MDEQ held the hearing at the Elizabeth Ann Johnson (Mount Morris) High School, 8041 Neff Road, Mount Morris, which is located approximately two miles from the site of the proposed facility. Complainants felt that the hearing should have been held at Carpenter Road Elementary School, 6901 Webster Road, Flint, Michigan, which is also located approximately two miles from the proposed site. *See Telephone Interview with Complainants (Sept. 17, 1998).* Carpenter Road Elementary School, however, is located south-east of the proposed site in a predominantly minority area, whereas Mount Morris High School is located north-west of the proposed site in a predominantly white area.⁶

⁶ No concerns were raised about the manner in which the public hearing itself was conducted. *See Telephone Interview with Complainants (September 17, 1998).*

III. METHODOLOGY

In order to assure that EPA had the necessary information to assess the allegations raised by Complainants, the Agency undertook a comprehensive effort to collect data. That effort began by gathering all of the information that the Agency had in its possession relevant to the complaint. Then, an investigator conducted a telephone interview on September 17, 1998 with Complainants, including Fr. Phil Schmitter and Sr. Joanne Chiaverini, Co-Directors, St. Francis Prayer Center; Lillian Robinson, President, Flint-Genesee United for Action, Justice, and Environmental Safety; and Janice O'Neal, Spokesperson, Flint-Genesee United for Action, Justice and Environmental Safety.

That was followed-up by a visit to Genesee County, Michigan and another interview with Fr. Schmitter, Sr. Chiaverini, and Janice O'Neal on September 29, 1998. That same day, investigators conducted an interview with representatives of the local health department, including Brian McKenzie, Jan Hendricks, and Toni McCrumb, Genesee County Health Department. The next day, the investigators collected documents from the Complainants.

On October 15, 1998, investigators visited Lansing, Michigan and collected documents from MDEQ. The next week, on October 21, 1998, investigators returned to Lansing and interviewed employees of MDEQ, including Brian Culham, Environmental Quality Analyst, Air Quality Division District Office; Dennis Drake, Chief, MDEQ Air Quality Division; Susan Robertson, State Assistant Administrator, MDEQ; Hien Nguyen, Permit Engineer, MDEQ; Lynn Fiedler, Supervisor, MDEQ Air Quality Division Permit Section; Robert Sills, Toxicologist, MDEQ; and Jeff Jaros, Modeling and Meteorology Unit, MDEQ.

Throughout the information collection effort, EPA was performing analyses on the available data. Regarding VOC-related concerns, EPA undertook a two-pronged approach that considered VOCs in their role both as precursors to ozone and, for some VOCs, as hazardous air pollutants. For the former approach, EPA examined the surrounding region to determine whether it satisfied the federal ambient air quality standards for ozone. Then, the Agency studied the additional contribution of ozone precursors from the proposed Select Steel facility to determine how those emissions would affect the region's compliance with the National Ambient Air Quality Standards ("NAAQS"). For the latter approach, reviewed MDEQ's analysis of Select Steel's potential air toxic emissions for evidence of adverse impacts based on whether resulting airborne concentrations exceeded thresholds of concern under State air toxics regulations. EPA also considered the potential Select Steel air toxic emissions together with air toxic emissions from Toxics Release Inventory facilities, the Genesee Power Station, and other major sources in the surrounding area.

Similarly, for other hazardous air pollutants, an analysis of the distribution of airborne toxic emissions was conducted, based on the information presented in the permit application and MDEQ documents.

To evaluate lead emissions, EPA evaluated the contribution of airborne lead from the proposed facility and the NAAQS for lead. In addition, EPA examined health data from the community surrounding the proposed facility. Particular attention was paid to children's lead exposures based on Complainants' allegation that "the children of Flint are already 'maxed out' on lead and are 50% above the national average of lead blood levels for children'." EAB Petition (quoting Dr. Rebecca Bascomb, M.D.). The Genesee County Health Department submitted information about blood lead levels in local children. MDEQ provided an analysis of lead deposition that they conducted in response to comments received during the permitting process. EPA gathered that data and analyzed it in light of the complaint.

To assess the allegations concerning public process, EPA evaluated the information from interviews with Complainants and MDEQ, and from documents gathered from the parties. The Agency then organized the information to determine how the process had been conducted and whether any problems arose.

IV. POSITION STATEMENT FROM THE RECIPIENT

A. Allegation Regarding Air Quality Impacts

MDEQ responded to the Title VI complaint on September 18, 1998. *See* Michigan Department of Environmental Quality's Response to the St. Francis Prayer Center Title VI Complaint of June 9, 1998 Regarding Select Steel at 1 (Sept. 18, 1998) ("MDEQ Response to Complaint"). MDEQ argued that an analysis of the air quality impacts of the proposed Select Steel facility should be limited to the impacts that fall within one mile of the site. Beginning from that position, MDEQ found that the population within 0.5 miles of the site is 88.5-93.1% white and 4.4-7.7% black. Within one mile, MDEQ found that the population is 93.3-94.3% white and 3.8-4.2% black. MDEQ stated that inclusion of populations beyond one mile was "virtually irrelevant." *Id.* at 2. MDEQ noted that the 0.5 mile and one mile population number show no disparate impact and that Michigan's population is 83.4% white and 13.3% black. In addition, MDEQ argued that "the levels of pollution emitted by Select Steel are safe for everyone."⁷ *Id.* MDEQ concluded that "there is no evidence that the granting of a permit for Select Steel has had any disparate impact on minorities." *Id.* at 3.

1. VOCs

In their EAB petition and in the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini raise concerns that the Select Steel permit will allow VOC emissions to go unmonitored for the first eighteen months of the mill's operation. MDEQ felt that VOC emissions would not pose a problem. The Permit Engineer believed that VOC emissions from the proposed facility would be comparable to VOC emissions from one-gallon of paint. *See* Interview with Hien Nguyen (Oct. 21, 1998).

2. Lead

In their EAB petition, Fr. Schmitter and Sr. Chiaverini alleged that Select Steel's permit was deficient because it lacks a monitoring requirement for lead. In response to the EAB Petition, MDEQ stated the technology that would allow continuous monitoring of lead emissions does not exist. In the absence of such technology, MDEQ chose to ensure Select Steel's compliance with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies the requirements of best available control technology ("BACT").

MDEQ determined that "even with the addition of the lead proposed to be emitted by Select Steel, the lead concentrations would be more than ten times lower than the National Ambient Air Quality Standards" of 1.5 micrograms per cubic meter (quarterly average). Response of the Michigan Department of Environmental Quality to the Petition of the St. Francis Prayer Center at

⁷ MDEQ noted, "'Safe' does not mean risk free," citing *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). MDEQ Response to Complaint at 2 n.2.

2, *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (Aug. 19, 1998) (“MDEQ Response to PSD Appeal”).

In the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini alleged that blood lead levels in children living in the vicinity of the proposed steel mill are already ‘maxed out’ on lead and are 50% above the national average of lead blood levels for children.” EAB Petition at 1. In response, MDEQ, however, cites a blood lead level study it conducted that indicates the “level of concern” for lead is 10 micrograms per deciliter (“ $\mu\text{g/dL}$ ”). Robert Sills, MDEQ, *Evaluation of the Potential Dry Deposition and Children’s Exposures to Lead Emissions from the Proposed Select Steel Facility*, at 2 (May 15, 1998) (“*BLL Study*”). At blood lead levels above this threshold, children’s development and behavior may be adversely affected. *See id.*

MDEQ stated that it conducted the *BLL Study* to estimate the potential for air deposition of lead from Select Steel into soil around the proposed facility. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead present in house dust (high, medium, and low). MDEQ then analyzed the differences between children’s environmental lead exposure under these three scenarios, in each instance comparing current estimated background blood lead levels (alternative “a”) to estimated blood lead levels after adding in Select Steel’s projected emissions (alternative “b”). *See id.*

3. Manganese

In the permit application, Select Steel proposed a manganese emission limit of 0.24 lb/hr which resulted in ambient air impacts greater than the initial threshold screening level (ITSL) of Michigan Air Toxics Rule 230. Mich. Admin. Code r. 336.1230 (“Air toxics from new and modified sources”). The ITSL for manganese is 0.05 micrograms per cubic meter on a 24 hour basis. MDEQ notified Select Steel of this deficiency in a letter dated February 5, 1998. To correct this deficiency, Select Steel proposed to enclose the roof monitor above the electric arc furnace (“EAF”), and install a hood and vent the captured emissions to the EAF baghouse. Letter from John F. Caudell, NTH Consultants, to Hien Nguyen, MDEQ (Feb. 20, 1998). The size of the baghouse was increased from 350,000 actual cubic feet per minute (“acfm”) to 400,000 acfm to accommodate the added flow from the new hood. In addition to the added control equipment, MDEQ imposed a BACT emission limit of 0.054 lbs/hr based on stack test data contained in another permit application (Republic Steel). The proposed changes resulted in a maximum impact on the ambient air of 0.03 micrograms per cubic meter, which is below the level specified by the State of Michigan as protective of human health for manganese. Air Quality Division, MDEQ, *Select Steel Corporation of America, Questions-and-Answers Document*, at 2 (April 28, 1998). MDEQ felt that those requirements for manganese from steel and iron mills are very strict. Interview with Hien Nguyen (Oct. 21, 1998).

4. Mercury

MDEQ stated that as a result of public comments, it requested additional analysis of mercury emissions. Briefing on Select Steel Air Use Permit (undated); Interview with Dennis Drake (Oct. 21, 1998). Because the facility is in the Mott Lake Watershed and could impact mercury levels in fish, the analysis supported the reduction of the mercury emission limit from 0.05 pound per hour in the draft permit to 0.005 pound per hour in the final permit. MDEQ personnel indicated that the mercury emission limit is the lowest of any permit issued for mini-mills and noted that most permits in EPA's Best Available Control Technology/Lowest Achievable Emissions Rate (BACT/LAER) Clearinghouse have no mercury limits at all. Interview with Hien Nguyen (Oct. 21, 1998).

5. Dioxin

In their EAB petition and in the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini alleged that the permit allows dioxin emissions to be unmonitored for the first eighteen months of the mill's operation. MDEQ responded that it did not require dioxin monitoring because continuous emissions monitoring systems ("CEMS") for dioxin do not exist. MDEQ Response to PSD Appeal at 6. MDEQ also claimed that EPA conducted research on American electric arc furnaces and concluded that dioxin emissions are not a concern in the operation of such furnaces. EPA reportedly found that American electric arc furnaces do not use chlorinated solvents in the melting process, that the electric arc furnaces are operated at very high temperatures, and that radiant heat from electricity (rather than coke combustion) is used to melt the scrap metal.⁸ MDEQ Response to PSD Appeal at 7; Air Quality Division, MDEQ, *Select Steel Corporation of America, Response to Comments Document* at 8 (May 27, 1998).

B. Allegation Regarding Discrimination in Public Participation

1. Timing of permit issuance

MDEQ argues that Complainants' allegation that it accelerated the issuance of the permit in order to avoid consequences of a potentially adverse decision the GPS case is incorrect because (1) the Circuit Court's decision in the GPS case "expressly dismissed all disparate impact claims against the MDEQ" and (2) the Michigan Court of Appeals stayed the Circuit Court's decision pending the outcome of the appeal. MDEQ Response to Complaint at 1.

In addition, according to MDEQ staff, the five months that lapsed between the submission of the permit application and the issuance of the permit was fairly typical. Among the last twenty-six

⁸ The U.S. EPA has stated, in part, "No testing of CDD/CDF emissions from U.S. electric arc furnaces has been reported upon which to base an estimate of national emissions." Exposure Analysis and Risk Characterization Group, U.S. EPA, *The Inventory of Sources of Dioxin in the United States*, at 7-14 (April 1998).

PSD permits approved by MDEQ, the average time between receipt of the application and approval of the permit was 242 days. The average time between the receipt of a complete application and approval was only 49 days. Message transmitted by facsimile from Lynn Fiedler to Richard Ida, at 4 (Oct. 28, 1998) (providing table of PSD permit processing times for last three years).

2. Relationship Between Select Steel and MDEQ

Some MDEQ employees, including Dennis Drake, Director, MDEQ Air Quality Division, noted their awareness of Mr. Shah's job with NTH Consultants, but were not aware that Mr. Shah was involved in the Select Steel application. Interviews with Dennis Drake and Robert Sills (October 21, 1998). Those MDEQ employees who knew about Mr. Shah's role in developing the Select Steel permit, including the Permit Engineer and Thermal Process Unit Supervisor, stated that no special treatment was given to Mr. Shah or to the Select Steel permit application. Interview with Hien Nguyen and Lynn Fiedler (October 21, 1998).

3. Notice of Public Hearing

MDEQ argued that it went beyond the requirements of the regulation and published notices about the hearing in three local newspapers: The Flint Journal on March 26, 1998, and March 27, 1998; The Suburban News on March 29, 1998; and The Genesee County Herald on April 1, 1998. Regarding direct notification about the hearing, MDEQ limited its mailings because they believed that Fr. Schmitter and Sr. Chiaverini would act as the contact point for their community and alert other interested parties about the proceedings. Interview with Lynn Fiedler (Oct. 21, 1998).

4. Location of Public Hearing

To select a site for the public hearing, MDEQ considered a number of criteria: (1) proximity to proposed facility, (2) sufficient capacity for attendees, (3) rental cost, (4) other accommodation-related considerations (*e.g.*, lighting, acoustics, adjacent rooms), and (5) availability. Interviews with Lynn Fiedler and Brian Culham (Oct. 21, 1998). For the public hearing on the Select Steel permit application, MDEQ expected up to 200 attendees, which limited the possible venues for the hearing. Interview with Susan Robertson (Oct. 21, 1998).

A MDEQ memorandum indicates that "there would be . . . a public hearing in the local area - either Carpenter Road school or another school close to the facility." Memorandum from Lynn Fiedler to the file (Dec. 8, 1997). The Air Quality Division Hearing Officer indicated that the first location she contacted was the Carpenter Road School. Other MDEQ employees felt that Carpenter Road School did not have adequate facilities for the Select Steel public hearing. Interviews with Brian Culham and Lynn Fiedler (Oct. 23, 1998). MDEQ also contacted the Beecher High School and its feeder schools. Telephone Interview with Judy Williams, Parent Involvement Coordinator, Beecher School District (Oct. 26, 1998). MDEQ felt that the administration of those schools seemed averse to hosting a controversial hearing. Interviews with

Susan Robertson and Lynn Fiedler (Oct. 21, 1998). MDEQ ultimately held the public hearing at Mount Morris High School, approximately two miles from the proposed facility, which they believed was a reasonable site. Interview with Lynn Fiedler (Oct. 21, 1998).

V. FINDINGS OF FACT AND STATUTORY/REGULATORY PROGRAMS

A. Allegation Regarding Air Quality Impacts

1. Background

a. Proposed Select Steel Corporation of America Facility

The proposed Select Steel facility is a steel mini-mill which is expected to produce 43 tons per hour of specialty steels. It will process scrap steel by “melting the scrap” in an electric arc furnace. The liquid steel is then transferred into a ladle furnace where it is reheated and chemically adjusted to required specifications. The molten steel is then cast and water-cooled in a mold to the desired shape.

The proposed Select Steel facility will be located near the boundary of census tract 122.01 within a 53 acre land parcel at the southwest corner of the intersection of Lewis Road and East Stanley Road, in Genesee County, Michigan, 48485. The facility will be located in Genesee County, Air Quality Control Region 122, *see* 40 C.F.R. § 81.195, less than one mile from the northern boundary of the city of Flint, Michigan at a latitude of 43° 6 '9" and longitude of 83° 40' 48".

The Select Steel facility is a major stationary source with the “potential to emit” 100 tons per year or more of the criteria pollutants, oxides of nitrogen (“NO_x”), carbon monoxide (“CO”), particulate matter (“PM”), and lead. The facility is subject to the PSD regulations, 40 C.F.R. § 52.21, which require the installation of BACT for the four pollutants mentioned above. The facility is also subject to MDEQ rule 702 and 230 which requires the installation of BACT for VOC’s.

The Select Steel Corporation of America submitted its initial PSD permit application under the Clean Air Act to MDEQ for the proposed mini-mill on December 30, 1997. MDEQ reviewed the application and sent a letter of deficiencies in the permit application on February 5, 1998, and requested additional information be submitted. Select Steel submitted their response on February 20, 1998. Changes and selection of BACTs for the criteria pollutants were made, including provisions to address the ambient air impacts of toxic air contaminants as required by MDEQ rule 230. Select Steel selected BACT for PM/PM₁₀, NO_x, CO, and VOCs. EPA reviewed the permit and supporting information (*e.g.*, staff report, BACT analysis, previous BACT determinations) and submitted comments during the public comment period. MDEQ approved the Select Steel permit on May 27, 1998.

b. Proximate Population Characteristics

In the 1990 Census, the total population of Michigan was 9,295,297 with 17.6 % minority population. The complaint alleges that minority populations within 3 miles of the proposed Select Steel will bear a “disparate impact of pollution.” At one mile from a point location representing

the approximate center of the facility land parcel, the population is 13.8% minority, at two miles it is 37.2% minority, at 3 miles it is 51.1% minority, at 4 miles it is 55.2% minority. See Table II: EPA Estimates of Population Characteristics Near Proposed Site.

c. Air Quality Regulatory Programs

i. Overview of National Ambient Air Quality Standards

The Clean Air Act (“CAA”) requires the Administrator of U.S. EPA to publish primary and secondary NAAQS for criteria air pollutants. Section 109 of the CAA, 42 U.S.C. § 7409. NAAQS are health-based standards which are established by the Administrator as necessary to “protect the public health” and must allow for an adequate margin of safety. Section 109(b) of the CAA, 42 U.S.C. § 7409(b).

Under section 107(d) of CAA, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality meets or does not meet the NAAQS for each listed pollutant, or where the air quality cannot be classified due to insufficient data (“unclassifiable”). An area that meets the NAAQS for a particular pollutant is termed an “attainment” area, and an area that does not is termed a “nonattainment” area. Among the listed criteria air pollutants are ozone and lead.

NAAQS, when met, provide public health protection with an adequate margin of safety, including protection for group(s) identified as being sensitive to the adverse effects of the NAAQS pollutants. EPA recognizes that there is no discernible threshold of physiological effects identified for any of the NAAQS pollutants and that there is a wide variability of responsiveness among individuals. EPA further recognizes, however, that setting of the NAAQS ultimately requires public health policy judgments of the Agency as to when physiological effects become medically significant and a matter of public health concern.

ii. Overview of Prevention of Significant Deterioration (PSD) Standards

The Clean Air Act’s PSD program applies to all areas of the country designated as “attainment” or “unclassifiable” relative to the NAAQS. CAA section 161, 42 U.S.C. § 7471. Genesee County is classified as an attainment area for all criteria pollutants except ozone. Genesee County was initially designated as a nonattainment area for the old 1-hour ozone standard. 43 Fed. Reg. 8962 (March 3, 1978); 45 Fed. Reg. 37188 (June 2, 1980). Genesee County demonstrated compliance with the old 1-hour ozone standard based upon three years of air quality data. 63 Fed. Reg. 31014 (June 5, 1998). In practical terms, this means that the old classification of “nonattainment” has been superseded by a determination that Genesee County was meeting the old ozone standard.

Under the Clean Air Act, each state must include a PSD program in its state implementation plan. CAA sections 110(a)(2)(C) and 161; 42 U.S.C. §§ 7410(a)(2)(C) and 7471. Among other things, a PSD program must ensure that new major stationary sources employ the best available control technology to minimize the emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. §§ 52.21(j)(2) and 51.166(j)(2). The statute gives permitting authorities substantial discretion to determine BACT in a manner consistent with the environmental protection goals of the PSD program, requiring consideration of “energy, environmental, and economic impacts.” CAA section 169(3); 42 U.S.C. § 7469(3).

If a state does not submit an approvable PSD program, the federal PSD regulations at 40 C.F.R. § 52.21 governing permit issuance apply. EPA may in turn delegate its authority to the state to issue federal PSD permits. *See* 40 C.F.R. § 52.21(u). Whether EPA or a delegated state actually issues the permit, the appeal of a federal PSD permit is governed by the regulations at 40 C.F.R. Part 124.

Because Michigan’s state implementation plan lacks an approved PSD program, the applicable requirements governing the issuance and appeal of PSD permits in Michigan are the federal PSD regulations at 40 C.F.R. § 52.21 and Part 124. *See* 40 C.F.R. § 52.1180. On September 10, 1979, pursuant to 40 C.F.R. § 52.21(u), EPA Region V delegated its authority to implement and enforce the federal PSD program to the State of Michigan. *See* 45 Fed. Reg. 8348 (1980). Although EPA Region V delegated administration of the PSD program in Michigan to the State, PSD permits issued by MDEQ follow the requirements in 40 C.F.R. § 52.21 and Part 124.

Having delegated its authority to administer the federal PSD program to Michigan, the relationship between EPA Region V and the MDEQ is an arms-length one. EPA Region V exercises careful oversight of the PSD program by reviewing permit applications and commenting where appropriate. Where the state issues a deficient permit, EPA Region V may appeal the permit to the Environmental Appeals Board.

The proposed Select Steel facility is a major stationary source with the “potential to emit” 100 tons per year or more of a regulated pollutant. In addition, the facility is proposed to exceed the “significant emission rate” as defined in the federal regulations for NO_x, CO, PM, and lead. *See* 40 C.F.R. § 52.21(b)(23). Since Genesee County is designated attainment for these pollutants, the Select Steel facility is subject to PSD review for these pollutants. 40 C.F.R. § 52.21(i). The proposed Select Steel facility also has the potential to emit 38 tons per year of VOCs and sulfur dioxide. These levels of emissions are not considered “significant” under the PSD regulations. 40 C.F.R. § 52.21(b)(23). As a result, the facility need not undergo PSD review for these pollutants.

Select Steel submitted a BACT analysis as part of its December 30, 1997 PSD permit application. The analysis included a “top down” approach consisting of five steps to evaluate and determine BACT:

1. Identify all control technologies;
2. Eliminate technically infeasible options;
3. Rank remaining control technologies;
4. Evaluate most effective controls and document results; and
5. Select BACT.

2. Specific Criteria Pollutants of Concern

Air dispersion modeling was conducted by the Select Steel facility to support a December 1997 PSD permit application filed with MDEQ. Some changes were made to the permit at the request of MDEQ, and subsequent modeling was conducted by MDEQ. The air quality model and the methodology used followed the recommendations in EPA's Guideline on Air Quality Models (Revised), codified at 40 C.F.R. Part 51, Appendix W. The modeling conducted for the criteria pollutants (*i.e.*, NO_x, SO₂, PM₁₀, and CO) showed predicted impacts well below the NAAQS.

The largest point of particulate air releases at the plant will occur at the electric arc furnace air pollution control equipment, described as the electric arc furnace or “melt shop” baghouse. Most fugitive emissions occurring within this area are captured and ducted to the baghouse for treatment. Other sources of criteria pollutants in the facility include: the lime silo; the baghouse dust silo; the boiler and the reheat furnace; nearby sources including the ladle dryer, preheaters, and dump station; tundish dump area, and material handling operation baghouses; and fugitive emissions from roads and the slagging operations. The location of the baghouse is at the northeast corner of melt shop. Carbon monoxide and VOC emissions will occur primarily at the output of the direct evacuation system canopy exhaust.

a. Volatile Organic Compounds

i. General Information

Volatile organic compounds are common reactive hydrocarbons which, together with nitrogen oxides, form ozone. The formation of ozone is a complex function of emissions and meteorological patterns and is the result of two coupled processes: (1) a physical process involving the dispersion and transport of the precursors (*i.e.*, VOCs and NO_x); and (2) the photochemical reaction itself. Both processes are strongly influenced by meteorological factors such as dispersion, solar radiation, temperature, and humidity. At ground-level, ozone is the prime ingredient of smog.

Short-term (1-3 hours) and prolonged (6-8 hours) exposures to ambient ozone concentrations have been linked to a number of health effects of concern. For example, increased hospital

admissions and emergency room visits for respiratory causes have been associated with ambient ozone exposures.

Exposures to ozone can make people more susceptible to respiratory infection, result in lung inflammation and aggravate preexisting respiratory diseases such as asthma. Other health effects attributed to short-term and prolonged exposures to ozone, generally while individuals are engaged in moderate or heavy exertion, include significant decreases in lung function and increased respiratory symptoms such as chest pain and cough. Children active outdoors during the summer when ozone levels are at their highest are most at risk of experiencing such effects. Other at-risk groups include outdoor workers, individuals with preexisting respiratory diseases such as asthma and chronic obstructive lung disease, and individuals who are unusually responsive to ozone. In addition, long-term exposures to ozone present the possibility of irreversible changes in the lungs which could lead to premature aging of the lungs and/or chronic respiratory illnesses. See U.S. EPA, National Air Pollutant Emission Trends, 1900-1996, EPA-454/R-97-011 (1997) ("Trends Report").

EPA promulgated a new NAAQS for ozone on July 18, 1997 (62 Fed. Reg. 38856). The new ozone standard is set at 0.08 parts per million and is calculated over an 8-hour averaging period. It replaces the old ozone standard of 0.125 parts per million based on a 1-hour averaging period.

Genesee County was initially designated as a nonattainment area for the old 1-hour ozone standard. 43 Fed. Reg. 8962 (March 3, 1978); 45 Fed. Reg. 37188 (June 2, 1980). Genesee County demonstrated compliance with the old 1-hour ozone standard based upon three years of air quality data. 63 Fed. Reg. 31014 (June 5, 1998). In practical terms, this means that the old classification of "nonattainment" has been superseded by a determination that Genesee County was meeting the old ozone standard.

On July 18, 1997, EPA established a new standard, effective on September 16, 1997, based on an 8-hour average. 62 Fed. Reg. 38856 (July 18, 1997). EPA examined recent air monitoring data (from 1995-97) from Genesee County in the context of investigating this complaint and has determined that Genesee County is also currently meeting the new 8-hour ozone standard (although official designations will not be made until the year 2000 and will be based on monitoring data from 1997, 1998, and 1999).

ii. Select Steel Permit Conditions for VOCs

The proposed Select Steel facility's potential to emit VOC's is not considered "significant" under the PSD regulations. However, the proposed facility is also subject to MDEQ rules 702 and 230 which requires the installation of BACT for VOCs.

In response to MDEQ concerns set forth in the deficiency letter of February 5, 1998, Select Steel reviewed additional information in EPA's Best Available Control Technology/Lowest Achievable Emissions Rate (BACT/LAER) Clearinghouse ("the Clearinghouse") and found an emission

factor lower than initially proposed in the permit application. As a result of this finding, the VOC emission estimate was lowered to 32 ton/yr from the electric arc furnace. Additional controls to reduce carbon monoxide emissions will also serve to reduce VOC emissions. MDEQ approved the BACT determination in permit condition 19. EPA Region V did not object to the BACT determination.

The permit issued by MDEQ gives Select Steel one year from plant start-up to implement a continuous emissions monitoring system (“CEMS”) for VOCs. The regulations give the permitting authority discretion in implementation of post construction monitoring. 40 C.F.R. § 52.21(m)(2). Pre-application monitoring of VOCs is not mandatory because Select Steel’s potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the permitting authority determines it necessary to track the effect VOC emissions may have or are having on air quality. 40 C.F.R. § 52.21(m)(2).

b. Lead

i. General Information

Lead accumulates in the blood, bones, and soft tissues and can also adversely affect the kidneys, liver, nervous system, and other organs. Excessive exposure to lead may cause neurological impairments such as seizures, mental retardation, and/or behavioral disorders. Even at relatively low doses lead exposure is associated with changes in fundamental enzymatic, energy transfer, and homeostatic mechanisms in the body, and fetuses and children may suffer from central nervous system damage. Recent studies show that lead may be a factor in high blood pressure and subsequent heart disease and also indicate that neurobehavioral changes may result from lead exposure during a child’s first years of life. *See Trends Report.*

In its 1978 final decision of the lead NAAQS, EPA estimated a maximum safe blood lead level and stated, “. . . the Agency should not attempt to place the standard at a level estimated to be at the threshold for adverse health effects but should set the standard at a lower level in order to provide a margin of safety. EPA believes that the extent of the margin of safety represents a judgment in which the Agency considers the severity of reported health effects, the probability that such effects may occur, and uncertainties as to the full biological significance of exposure to lead.” 43 Fed. Reg. 46247 (Oct. 5, 1978).

Since the lead NAAQS was set in 1978, ambient air concentrations of lead have declined by 97 percent, which tracks well with the decline of 98 percent in overall emissions since 1975. *See Trends Report.* Most decreases in emissions were the result of the phase-out of leaded gasoline.

ii. Select Steel Permit Conditions for Lead

The significance threshold for lead emissions under PSD is 0.6 tons per year (“tpy”). The proposed Select Steel facility’s controlled maximum lead emissions based on continuous operations would be 0.66 tpy, and would thus be significant for purposes of PSD. Select Steel concluded that 2.8% of the particulate emissions from the electric arc would be lead. MDEQ chose to ensure Select Steel’s compliance with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies BACT. The permit also mandates monitoring of baghouse operating parameters to ensure proper functioning, performance of a stack test to verify that lead emissions do not exceed the permit limit, visible emissions monitoring, and several maintenance and contingency measures. The lead BACT emission limit of 0.15 pounds per hour was approved by MDEQ in permit condition 18.

iii. Other Local Assessments of Lead in the Environment

In its review, MDEQ conducted an analysis of the impact of lead emissions from the proposed facility in addition to the NAAQS determination. This analysis assessed the impact on children who might be exposed to soil or household dust whose concentrations of lead would increase as a result of atmospheric emissions. MDEQ conducted this analysis based on issues raised during the permit public comment period and at the public hearing, MDEQ Response to PSD Appeal at 2, and published the results in its *BLL Study*, dated May 15, 1998.

The MDEQ analysis used a model of exposure to lead from several pathways (inhalation as well as ingestion of soil, house dust and water) to predict what fraction of a hypothetical group of children would have elevated blood lead levels under both baseline (existing) conditions and with the increase of emissions resulting from the operations of the proposed facility. EPA reviewed the MDEQ analysis of the predicted baseline incidence of elevated blood lead levels, and the incremental increase predicted to result from the new facility.

EPA, in addition to reviewing the assumptions used in the MDEQ lead modeling, also reviewed other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility. EPA conducted this additional review to respond to Complainant’s concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. *See* EAB Petition at 1.

iv. Background on Lead Exposures and Levels of Concern

Human exposure to lead now occurs mainly through ingestion of lead in household dust, water, food, and soil, as well as inhalation. Currently, the most likely pathways of lead exposure in young children are ingestion of interior house dust. A significant immediate source of lead in soil and dust is from deteriorating paint used before 1978, especially if unprotected renovation or remodeling activities have been conducted. Lead in exterior soils may migrate indoors on

residents' clothing and via winds. Other major historical sources of lead in soils include deteriorating exterior paint and rainwater runoff from structures, as well as atmospheric deposition from industry or historical use of leaded gasoline.

The Centers for Disease Control and Prevention (CDC) and EPA have identified a blood lead concentration of 10 $\mu\text{g}/\text{dL}$ as a level of concern for sensitive populations (in particular young children) and have established health policy goals to limit the risk that young children would have blood lead levels above this value. According to the most recent CDC estimates, 890,000 U.S. children age 1-5 (or approximately 4.4% overall) have elevated blood lead levels, while more than one-fifth of African-American children living in housing built before 1946 have elevated blood lead levels.

v. Impacts from Proposed Facility - MDEQ's Lead Dispersion/Deposition Modeling

Using estimates of the modeled atmospheric concentrations of lead, the *BLL Study* assessed the likely impact of deposition of lead to nearby soil. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead already present in house dust (high, medium, and low). MDEQ then analyzed the differences between children's environmental lead exposure under these three scenarios using the Integrated Exposure Uptake Biokinetic Model for Lead in Children ("IEUBK"). In each scenario, MDEQ compared current estimated background blood lead levels (scenario alternative "a") to estimated blood lead levels after adding in Select Steel's projected emissions (scenario alternative "b"). MDEQ's findings are presented in Table 4 of the *BLL Study*.

vi. IEUBK Model

As previously mentioned, the MDEQ *BLL Study* attempts to predict blood-lead concentrations (blood lead levels) for children exposed to lead in their environment. The model allows the user to input relevant absorption parameters (*e.g.*, the fraction of lead absorbed from water), as well as rates for intake and exposure. Using these inputs, the IEUBK then rapidly calculates and recalculates a complex set of equations to estimate the potential concentration of lead in the blood for a hypothetical child or population of children (six months to seven years).

The IEUBK estimates exposure using age-weighted parameters for intake of food, water, soil, and dust. The model simulates continual growth under constant exposure levels (on a year-to-year basis). In addition, the model also simulates lead uptake, distribution within the body, and elimination from the body.

The IEUBK is intended to:

Estimate a typical child's long-term exposure to lead in and around his/her residence based on inputs concerning the presence of lead in various environmental media;

Provide an accurate estimate of the geometric average blood lead concentration for a typical child aged six months to seven years;

Provide a basis for estimating the risk of elevated blood lead concentration for a hypothetical child;

Predict likely changes in the risk of elevated blood lead concentration from exposure to soil, dust, water, or air following activities which might increase or decrease such exposure.

A site-specific risk assessment requires information on soil and dust lead concentrations for the particular site in question. Variables affecting any consideration of lead exposure from soil and dust include: soil to indoor dust transfer; ingestion parameters for soil and dust (*i.e.*, how much soil or dust a typical child may ingest or inhale over a set period of time); and the amount of lead that can be absorbed from the soil. The model is quite sensitive to these parameters—that is, changing one variable can significantly affect the results. The IEUBK is designed to facilitate calculating the risk of elevated blood lead levels, and is helpful in demonstrating how results may change under different assumptions of inputs.

vii. MDEQ Inputs to the IEUBK Model

In its analysis, MDEQ used the point of maximum off-site atmospheric quarterly average concentration estimated to occur from lead releases from Select Steel. This maximum concentration point was located within about a hundred meters south and west from the facility fenceline, generally in an area listed on as U.S. Geological Survey (“USGS”) map as being occupied by waste ponds. This level was used to estimate the dry deposition to soil, and in subsequent modeling of the potential effects on a population of children which were assessed as if they were exposed to soils containing the deposited lead at the maximum level.

The deposition estimate involved multiplying the quarterly maximum ambient lead concentration, determined by dispersion modeling, by a dry deposition velocity. The deposition velocity assumed was 5 centimeters per second. Although the preferable approach for calculating deposition flux values is through the use of the Industrial Source Complex (“ISC”) model, the velocity assumed in the MDEQ seems reasonable and is comparable to a settling velocity for lead calculated using equation 1-55 in Volume II of the User’s Guide for the Industrial Source Complex (“ISC2”) Dispersion Models (a velocity of 6.8 cm/s can be calculated using the conservative assumption that all the particles were 10 microns in diameter). Wet deposition was not considered in MDEQ’s assessment apparently due to the lack of precipitation data. Wet deposition can account for a significant portion of the total deposition with impacts often occurring much closer to the facility than the dry deposition impacts. The modeling of soil and air impacts methodology detailed in the MDEQ report is reasonable as an estimation of dry deposition of lead.

The *BLL Study* estimated the deposition rate at the point of maximum concentration, and assumed a constant deposition at that rate over a 30 year period. After mixing with the top 1 cm of soil, this would increase the estimated soil lead concentration by about 14 parts per million (“ppm”). At further distances and directions from the facility emission source, the predicted concentration and deposition would decrease, so the estimate of deposition at inhabited areas may be somewhat less.

viii. Results of the MDEQ IEUBK Model

The *BLL Study* found that the blood lead impacts from the facility would be small. The maximum air lead concentrations from the facility were estimated to result in changes in geometric mean (typical) blood lead levels of about 0.1 $\mu\text{g/dL}$. EPA’s review identifies some refinements that would be appropriate in similar model applications in the future. However, EPA concurs that the predicted impacts on blood lead levels would be small.

3. Overview of Air Toxics

The CAA and state programs provide protection against the effects of toxic air pollutants. Title III of the CAA identifies 189 hazardous air pollutants (“HAPs”) and establishes a regulatory program to control HAP emissions from many industrial sources. The federal program also controls air toxics from mobile sources and from area sources in urban areas. In addition, individual states, including Michigan, have developed and implemented air toxics legislation and regulatory programs.

EPA promulgates regulations for HAPs under section 112 of the CAA. 42 U.S.C. § 7412. This federal air toxics program requires maximum achievable control technology (“MACT”) in its first phase and an assessment and control of residual risk remaining after the application of MACT. Those provisions, however, are not applicable to the proposed Select Steel facility. For section 112, the source category (electric arc furnaces) that includes steel recycling mini-mills was delisted because “there are no existing facilities which qualify as a major source,”⁹ 61 Fed. Reg. 28,197 (1996), and, as a result, those sources will not be regulated under section 112. Section 129 only concerns solid waste incineration units, *see* 42 U.S.C. § 7429(a), and would not apply to Select Steel.

Michigan’s Rule 230 requires permit applicants to install best available control technology for certain sources of air toxics (“T-BACT”) and to perform a modeling analysis and compare those results with the initial risk screening levels. Rule 230 also allows MDEQ to establish a lower maximum emission limit if they determine T-BACT does not protect the public or the environment adequately.

⁹ A major source is a stationary source “that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.” 42 U.S.C. § 7412(a)(1).

Potential emissions of toxic air contaminants were estimated by Select Steel using the average emission factors from similar facilities previously issued permits by the MDEQ and the Air and Waste Management Association compilation of baghouse dust compositions. Toxic air contaminants associated with mini-mills include metals and toxic components of VOCs. The toxic metals of concern were identified in the permit application to be cadmium, chromium, manganese, mercury, and nickel.

Modeling done by Select Steel's consultant indicated that the ground level impacts of air toxics were below the MDEQ screening levels for all air toxics of concern except manganese. As a result of the MDEQ review and public comment, permit changes were made to further reduce the emissions and impact of two of air toxics of concern to Complainants, namely manganese and mercury.

a. Select Steel Permit Conditions for Manganese

After the Select Steel permit application was submitted, additional stack test data was submitted to MDEQ in another permit application for Republic Steel (also a proposed steel mini mill) which indicated manganese emissions may be lower than previously predicted. Based on this information, a revised lower emission rate of 0.05 lb/hr was established for Select Steel. This emission limit along with closing the roof monitor and additional hooding resulted in predicted ambient air impacts below the MDEQ screening levels. The revised emission limit of 0.05 pounds per hour was approved by MDEQ as T-BACT in permit condition 25.

b. Select Steel Permit Conditions for Mercury

After an MDEQ review of other sources of data including the Ohio EPA's stack testing database, MDEQ determined that the prospective mercury emission levels outlined in the permit application were not representative of T-BACT. In a letter dated April 24, 1998, Select Steel agreed to reduce the mercury emission limits by a factor of 10. The draft permit was changed and the emission rate for mercury was lowered from 0.05 pound per hour to 0.005 pound per hour. The exhaust gas concentrations for mercury were also reduced by a factor of 10 to 3.84 micrograms/dscf, as specified in permit condition 25. In addition, permit condition 51 was added to require a further assessment of the impact of mercury emissions from the facility on the Mott Lake watershed, unless source testing reveals that the mercury emissions are less than 0.0004 lbs/hr.

c. Other Air toxics

To assess air toxics emissions from the proposed Select Steel facility, EPA assessed both the facility's air toxics emissions, as well as the existing level of air toxics in the surrounding area. Data on other sources of air toxics comes from EPA's Toxics Release Inventory ("TRI").

The facilities reporting to the 1996 Toxics Release Inventory (U.S. EPA 1998) are currently those facilities which are manufacturing facilities in Standard Industrial Classification (“SIC”) codes 20-39 and employ at least 10 people. They must report annual releases and transfers of chemicals which are on the TRI list and which are manufactured, processed or otherwise used above threshold amounts. TRI reports include separate information on releases to each environmental medium (*e.g.*, air, water, land) and offsite transfers for treatment or disposal, as well as chemicals recycled, used in energy recovery, and present in waste streams. The list of chemicals subject to reporting in 1996 (the most recent year for which data are available) included approximately 650 chemicals and chemical classes. The TRI database contains a wide range of manufacturing facility types, including chemical, rubber, plastics, and petroleum refineries, food processing (*e.g.*, sugar refineries), electronics manufacturing, and other miscellaneous facilities, such as soft drink bottling facilities. Many sources of air toxics, including small sources (*e.g.*, dry cleaners or gasoline service stations) and non-manufacturing sources (*e.g.*, waste treatment facilities and energy generation plants) were not required to report even if they met the chemical quantity thresholds.

Should the Select Steel facility operate, it is expected to report to TRI. Sixteen TRI facilities are located within 12 miles from the approximate center of the proposed Select Steel facility. Two had zero air releases reported to TRI in 1996; therefore they were not included in the modeling analysis.

4. Dioxin Monitoring

a. General Information

Chlorinated dibenzo-*p*-dioxins and related compounds (commonly known simply as dioxins) are contaminants present in a variety of environmental media. Human studies demonstrate that exposure to dioxin and related compounds is associated with subtle biochemical and biological changes whose clinical significance is as yet unknown and with chloracne, a serious skin condition associated with these and similar organic chemicals. Laboratory studies suggest the probability that exposure to dioxin-like compounds may be associated with other serious health effects including cancer.

EPA promulgates regulations for dioxin emissions under sections 112 and 129 of the Clean Air Act. 42 U.S.C. §§ 7412, 7429. Those provisions, however, are not applicable to the proposed Select Steel facility. For section 112, the source category that includes steel recycling mini-mills was delisted because “there are no existing facilities which qualify as a major source,” 61 Fed. Reg. 28,197 (1996), and, as a result, those sources are not expected to be regulated at this time under section 112. Section 129 only concerns solid waste incineration units, *see* 42 U.S.C. § 7429(a), and would not apply to Select Steel.

In addition, EPA has no emissions data for American mini-mills to either support or contradict MDEQ’s belief. A recent inventory of dioxin sources indicates that information has not yet been

developed to determine whether dioxin is a pollutant of concern from facilities like Select Steel. Exposure Analysis and Risk Characterization Group, U.S. EPA, *The Inventory of Sources of Dioxin in the United States*, at 7-14 (April 1998).

To the extent that any regulations may be applicable to dioxin in other circumstances, no continuous emission monitoring system has been proven for use with dioxin by EPA. *See* 40 C.F.R. Parts 60, 61, 63, and 64.

b. Select Steel Permit Conditions for Dioxin

The permit contains no monitoring or any other requirement for dioxin.

B. Allegation Regarding Discrimination in Public Participation

According to EPA's regulations for issuance of PSD permits, 40 C.F.R. Part 124, Subpart A, MDEQ is required to provide public notice that a draft permit has been prepared, 40 C.F.R. § 124.10(a)(1)(ii), with at least 30 days for public comment. 40 C.F.R. § 124.10(b). In addition, MDEQ must hold a public hearing whenever they find a significant degree of public interest based on requests for a hearing. 40 C.F.R. § 124.12(a). Public notice of the hearing must be given at least 30 days prior to the hearing. 40 C.F.R. § 124.10(b)(2). That notice must be provided by (1) mailing a copy of the notice to certain interested parties, (2) publishing in a weekly or daily newspaper within the affected area, and (3) any other method reasonably calculated to give actual notice. 40 C.F.R. § 124.10(c).

In this case, MDEQ published notices about the draft permit in The Flint Journal on March 26, 1998, and March 27, 1998, in The Suburban News on March 29, 1998, and in The Genesee County Herald on April 1, 1998. In the same notices, MDEQ indicated that a public hearing would be held on April 28, 1998, beginning at 7:00 p.m. at the Mount Morris High School. Mt. Morris High School is located approximately two miles from the proposed site. MDEQ also mailed the notice to Fr. Schmitter, Sr. Chiaverini, and several other individuals in the community who had expressed interest in the permit.

The permit applicant, Select Steel, and local government officials also held two informational meetings prior to MDEQ's public hearing. The first was held February 12, 1998, at Kearsley High School, 4302 Underhill Drive, Flint, Michigan, and the second was held February 19, 1998, at Mount Morris High School. These meetings were not required by any state or federal statute or regulation, and were held without the participation of MDEQ.

VI. ANALYSIS AND RECOMMENDED DETERMINATION

A. Allegation Regarding Air Quality Impacts

The environmental laws that EPA and the states administer generally do not prohibit pollution outright; rather, they treat some level of pollution as “acceptable” when pollution sources are regulated under individual, facility-specific permits, recognizing society’s demand for such things as power plants, waste treatment systems, and manufacturing facilities. In effect, Congress--and, by extension, society--has made a judgment that some level of pollution and possible associated risk should be tolerated for the good of all, in order for Americans to enjoy the benefits of a modern society--to have electricity, heat in our homes, and the products we use to clean our dishes or manufacture our wares. Similarly, society recognizes that we need facilities to treat and dispose of wastes from our homes and businesses (such as landfills to dispose of our trash and treatment works to treat our sewage), despite the fact that these operations also result in some pollution releases. The expectation and belief of the regulators is that, assuming that facilities comply with their permit limits and terms, the allowed pollution levels are acceptable and low enough to be protective of most Americans.

EPA and the states have promulgated a wide series of regulations to effectuate these protections. Some of these regulations are based on assessment of public health risks associated with certain levels of pollution in the ambient environment. The NAAQS established under the Clean Air Act (CAA) are an example of this kind of health-based ambient standard setting. Air quality that adheres to such standards is presumptively protective of public health. Other standards are “technology-based,” requiring installation of pollution control equipment which has been determined to be appropriate in view of pollution reduction goals. In the case of hazardous air pollutants under the CAA, EPA sets technology-based standards for industrial sources of toxic air pollution. The maximum achievable control technology standards under the Clean Air Act are examples of this kind of technology-based standard setting. After the application of technology-based standards, an assessment of the remaining or residual risk is undertaken and additional controls implemented where needed.¹⁰

¹⁰ Clean Air Act § 112(f)(2)(A)(1) states “. . . If standards promulgated pursuant to subsection (d) and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such category.” 42 U.S.C. § 7412(f)(2)(A)(1).

Title VI and EPA's implementing regulations¹¹ set out a requirement independent of the environmental statutes that all recipients of EPA financial assistance ensure that they implement their environmental programs in a manner that does not have a discriminatory effect based on race, color, or national origin. If recipients of EPA funding are found to have implemented their EPA-delegated or authorized federal environmental programs (*e.g.*, permitting programs) in a manner which distributes the otherwise acceptable residual pollution or other effects in ways that result in a harmful concentration of those effects in racial or ethnic communities,¹² then a finding of an adverse disparate impact on those communities within the meaning of Title VI may, depending on the circumstances, be appropriate.

Importantly, to be actionable under Title VI, an impact must be both "adverse" and "disparate." The determination of whether the distribution of effects from regulated sources to racial or ethnic communities is "adverse" within the meaning of Title VI will necessarily turn on the facts and circumstances of each case and the nature of the environmental regulation designed to afford protection. As the United States Supreme Court stated in the case of *Alexander v. Choate*, 469 U.S. 287 (1985), the inquiry for federal agencies under Title VI is to identify the sort of disparate impacts upon racial or ethnic groups which constitute "sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." *Id.* at 293-94 (emphasis added).

The complaint in this case raises air quality concerns regarding several NAAQS-covered pollutants, as well as several other pollutants. With respect to the NAAQS-covered pollutants, and as explained more fully below, EPA believes that where, as here, an air quality concern is raised regarding a pollutant regulated pursuant to an ambient, health-based standard, and where the area in question is in compliance with, and will continue after the operation of the challenged facility to comply with, that standard, the air quality in the surrounding community is presumptively protective and emissions of that pollutant should not be viewed as "adverse" within the meaning of Title VI. By establishing an ambient, public health threshold, standards like the NAAQS contemplate multiple source contributions and establish a protective limit on cumulative emissions that should ordinarily prevent an adverse air quality impact.

¹¹ Title VI of the Civil Rights Act of 1964, as amended, provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance." 42 U.S.C. section 2000d et seq. EPA's Title VI implementing regulations provide that recipients of EPA financial assistance "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination" because of their race, color, or national origin. 40 C.F.R. § 7.35(b)

¹² For example, scenarios involving the combined impacts of multiple pollutants, multiple pathways, and multiple plants.

With respect to the pollutants of concern in the complaint which are not covered by the NAAQS, Title VI calls for an examination of whether those pollutants have become so concentrated in a racial or ethnic community that the addition of a new source will pose a harm to that community. Because EPA has determined that there is no “adverse” impact for anyone living in the vicinity of the facility, it is unnecessary to reach the question of whether the impacts are “disparate.”

1. Volatile Organic Substances

a. VOCs as Ozone Precursor

Based on the information that was made available, EPA technical experts determined that MDEQ’s regulatory modeling was generally conducted in accordance with EPA’s Guideline on Air Quality Models. The proposed maximum allowable emissions for VOCs from the proposed Select Steel facility are 38.5 tpy. Sources with potential VOC emissions of less than 40 tons per year are not considered a significant source under federal PSD regulations. 40 C.F.R. § 52.21(b)(23)(i).

Genesee County has been effectively determined to meet the NAAQS for ozone (the pollutant of concern from VOC emissions) for both the old 1-hour standard and the new 8-hour standard. *See* 63 Fed. Reg. 31014 (June 5, 1998). Select Steel’s maximum modeled impacts from the criteria pollutants of concern to the Complainants are below the NAAQS. In particular, for ozone, the proposed Select Steel facility’s emissions are not expected to cause an increase in concentrations above a level deemed presumptively protective of public health. Accordingly, since the NAAQS for ozone is a health-based standard, which has been set at a level necessary to protect public health and allows for an adequate margin of safety for the population within the attainment area, there would be no affected population that suffers “adverse” impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For this reason, with regard to VOC emissions as ozone precursors, it is recommended that EPA find that MDEQ did not violate Title VI or EPA’s implementing regulations.

b. VOC Monitoring

In response to the Complainants’ allegation that the permit allows VOC emissions to go unmonitored for the first eighteen months of the mill’s operation, the EAB found that this was “somewhat of a misreading of the permit.” EAB Decision at 5. Permit condition 33 allows Select Steel to operate for one and possibly up to two years before it must begin VOC monitoring. MDEQ stated that because Select Steel’s potential to emit VOCs is not significant, “VOC emissions monitoring is not required under federal law.” MDEQ Response at 7. The EAB found that statement, while “technically true, is [was] somewhat misleading.” EAB Decision at 5. The EAB stated that “*pre-application* monitoring of VOCs is not mandatory because Select Steel’s potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. *See* 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the permitting authority determines

it necessary to track the effect VOC emissions may have or are having on air quality. 40 C.F.R. § 52.21(m)(2).” *Id.* at 6.

MDEQ’s permit condition regarding VOC monitoring allows Select Steel one year from plant start-up to implement a CEMS for VOCs.. However, Select Steel may choose to install an alternative monitoring system, called “parametric monitoring,” instead of the CEMS. If Select Steel does so, MDEQ must first review, test, and accept the system. If MDEQ rejects the parametric system, the permit states that Select Steel must install CEMS within two years of plant start-up. The EAB noted that “MDEQ does not explain why Select Steel is given up to two years to bring VOC emissions monitoring on-line. However, the regulations give the permitting authority discretion in implementation. 40 C.F.R. § 52.21(m)(2).” EAB Decision at 6.

MDEQ is not required to prescribe immediate VOC monitoring because EPA’s regulations allow the permitting authority to impose post-construction monitoring as it “determines is necessary.” 40 C.F.R. § 52.21(m)(2). Moreover, as discussed elsewhere, there would be no affected population that suffers “adverse” impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For these reasons, it is recommended that EPA find that, with regard to VOC monitoring, MDEQ did not violate Title VI or EPA’s implementing regulations.

2. Lead

Genesee County has been determined to meet the NAAQS for lead. Based on the available information, EPA technical experts determined that MDEQ’s lead modeling was generally conducted in accordance with EPA’s Guideline on Air Quality Models. Overall, the maximum predicted impacts from the Select Steel facility are generally very close in to the facility; either at or near the fenceline.

The significance threshold for lead emissions under PSD is 0.6 tpy. The proposed Select Steel facility maximum lead emissions based on continuous operations would be 0.66 tpy, and would thus be significant for purposes of PSD. MDEQ chose to ensure Select Steel’s compliance with the permit’s lead emissions limit of 0.15 pounds per hour by requiring the company to install a baghouse that MDEQ determined satisfied BACT.

Select Steel’s maximum modeled impacts from lead are below the NAAQS. Accordingly, the proposed Select Steel facility emissions are not expected to cause an increase in lead concentrations above a level deemed presumptively protective of public health. Since the NAAQS for lead is a health-based standard which has been set at a level necessary to protect public health and allows for an adequate margin of safety for the population within the attainment area, there would no affected population that suffers “adverse” impacts within the meaning of Title VI resulting from the incremental lead emissions from the proposed Select Steel facility. As discussed more fully below, EPA’s analysis of data on blood lead levels in the vicinity of the facility does not suggest a different conclusion. For these reasons, it is recommended that EPA

find that, with regard to lead emissions, MDEQ did not violate Title VI or EPA's implementing regulations.

a. EPA's Review of the MDEQ *BLL Study*

In response to public concerns about lead in the local environment, MDEQ appropriately undertook an examination of children's blood lead levels in the area. EPA found that the *BLL Study* was a conscientious attempt to address the impact of air emissions from the facility on children's blood lead levels and that MDEQ's use of the IEUBK model in the report was generally applied in a reasonable manner. EPA determined that MDEQ did not explicitly consider one particular pathway of exposure, namely the additional lead in house dust directly resulting from increased lead concentrations in the atmosphere (*i.e.*, from emissions by proposed facility), but this fact did not affect EPA's conclusions regarding the integrity of the study.

EPA reviewed the MDEQ IEUBK report's conclusions, including the assertion that "the modeling of blood lead levels under these scenarios demonstrated little or no differences due to the proposed facility's maximum potential impact, for each scenario." *BLL Study* at 9. EPA concurs that any impacts would be small and found no reason to conclude that these results were not valid. Based on the available information concerning the releases, the additional deposits of lead in soil and dust from Select Steel are likely to have a *de minimis* incremental effect on local mean blood lead levels and the incidence of elevated levels.

b. EPA's Review of Other Available Data on the Incidence and Likelihood of Elevated Blood Lead Levels in Genesee County

As previously mentioned, EPA also reviewed other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility, in view of complainant's concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. EAB Petition at 1.

EPA reviewed available county health data for children with measured elevated lead levels. The overall county average in 1997 was approximately 8%. In zip code 48458, which contains the site of the proposed facility and the expected maximum ambient lead concentration resulting from plant emissions, the incidence rate above 10 $\mu\text{g}/\text{dL}$ in 1997 was about 3%, which is similar to the CDC estimate for the national average (4.4%).

In addition, EPA reviewed more specific geographic information than the zip code area totals because zip code areas are relatively large and may contain areas of high and low incidence which together combine in an average. For example, in 1995, when the Genesee County Health Department offered free testing to residents in the neighborhood of the Genesee Power Station facility at the Carpenter Road School, twenty-nine children under age 15 were tested, and none were found to have elevated levels of lead.

Further, EPA assessed another indicator of elevated lead levels: age of housing. The HUD national survey of lead in housing found a correlation among lead in interior house dust, the presence of lead paint, and age of housing (*e.g.*, built prior to 1950) (CDC, Screening Young Children for Lead Poisoning, 1997). While the presence of older housing units has been identified as an indicator of elevated blood lead levels, there is no explicit guidance as to the proportions which would be of concern. Interpreting these data can be informed by recent guidance on what levels might warrant a significant public health testing effort.

The Centers for Disease Control and Prevention (“CDC”) and the American Academy of Pediatrics guidance on conducting testing of children in geographic areas suggests that, depending on the presence of several factors, either universal or targeted screening may be recommended. CDC suggests conducting universal screening if the prevalence of housing units built prior to 1950 in an area is above the national average (27%), or if the prevalence of measured blood lead levels above 10 $\mu\text{g/dL}$ in 1- and 2-year olds is greater than 12%, then all children in the area should be routinely screened. If these criteria are not met, children should be screened on the basis of information collected about their specific situation (*e.g.*, for Medicaid recipients, children living in older (pre-1950) housing units, children present during a renovation of pre-1978 housing unit).

The zip code containing the proposed facility covers a large area, and includes Mt. Morris township, which contains a larger proportion of older housing than most of the county. On average, the percentage of pre-1950 housing in zip code 48458 is about 22%, or below the CDC suggested level which would trigger universal screening of blood lead levels in young children.

Overall, EPA found no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by lead emissions from Select Steel. EPA also concluded that lead emissions from the proposed Select Steel facility are unlikely to have significant impacts on blood lead levels of children living in the vicinity. While EPA believes that airborne lead emissions from the Select Steel facility are neither actionable under Title VI nor cause for particular concern, this does not mean that there is not a broader lead concern in Genesee County that warrants attention separate and apart from Title VI. EPA has noted that blood lead data available for Genesee County provide a basis for an ongoing lead exposure assessment. Approximately 8% of children screened for blood lead in Genesee County in 1997 exceeded the federal blood lead goal of 10 $\mu\text{g/dL}$. The available screening data also indicate a greater risk of elevated blood lead levels among African-American children. (Four percent of African-American children screened between July 1995 and June 1998 had blood lead levels greater than 15 $\mu\text{g/dL}$, while 1% of white children exceeded this level. Data tabulated by race were not available for all blood lead levels exceeding 10 $\mu\text{g/dL}$.) Under these circumstances, EPA believes that, separate and apart from this case, further locally focused efforts are warranted to reduce existing prevalence of elevated blood lead levels.

Public health efforts to mitigate existing blood lead risks can include:

- continued blood lead screening, outreach, and intervention efforts directed to at-risk populations;
- generation of additional data on patterns of the occurrence of damaged lead-based paint and elevated levels of lead in residential soils and dusts;
- focused educational and assistance programs to aid residents and dwelling owners in reducing existing sources of lead exposure.

EPA supports continued local efforts to assess and reduce potential lead exposures in children, and is prepared to provide assistance in the planning of intervention efforts and in the identification of resources to support this work.

3. Air Toxics

In its review of the permit for the proposed Select Steel facility, MDEQ used air models to estimate atmospheric concentrations and compare them to screening thresholds defined by the state. Modeled levels of air toxics emissions from the issued permit for the proposed facility did not exceed state thresholds of concern. These MDEQ assessments were performed on a chemical-specific basis, and did not attempt to aggregate the impacts of all releases combined.

EPA's approach to analyzing air toxics had some elements in common with MDEQ's NAAQS review, in that it used air models to evaluate potential concentrations of air emissions from multiple sources. It also extended this approach to include multiple chemicals, whose potential impacts were combined on the basis of similar health effects. Chemicals that may cause cancer were considered separately from those which may only cause other chronic toxic effects, because combining these different types of effects may significantly increase uncertainties. Acute effects were not considered in the analysis because neither appropriate emissions data nor toxicity data were available. For these air toxic releases, no ambient concentration regulatory standards are generally available, either singly or in combination. The EPA approach used the modeled concentration estimates along with residential population information for Census blocks to estimate exposures, and health based benchmarks to project risks of potential impacts.

a. Technical approach for air toxics evaluation

EPA conducted an analysis of the distribution of airborne toxic emissions from TRI facilities in the same area as the proposed facility. EPA modeled average concentrations at each inhabited Census block within six miles of the proposed site as a reasonable assumption of the likely maximum geographic extent of potential impacts. To assure that the contributions of the facilities outside the six-mile radius to blocks inside the circle were considered, all facilities in the analysis included those within an additional six miles (*i.e.*, all those within twelve miles) of the proposed Select Steel site.

The proposed Select Steel facility's air toxics emissions were obtained from MDEQ documents listing maximum permitted limits. Modeled chemicals included arsenic, barium, cadmium, chlorine, chromium, manganese, mercury, nickel oxide, and zinc oxide, as well as lead.

In addition to the proposed facility, a total of 16 facilities were modeled, composed of 15 TRI facilities plus Genesee Power Station ("GPS") (which was permitted to release lead and a number of other metals). Of the chemical-specific air toxics emissions listed, methyl pyrrolidone and benzo(a)pyrene (GPS only) were not modeled due to lack of available toxicity data. The proposed facility's emissions of vanadium pentoxide and aluminum chloride were also not modeled due to lack of available EPA toxicity information. If the MDEQ ambient concentration screening levels were used to rank the potential degree of toxicity of the permitted chemicals, the ranks for these substances would be the second and third least toxic of the 10 considered, or of slightly higher concern than zinc. This ranking would also place them nearly five orders of magnitude (or a factor of 100,000) less toxic than arsenic or cadmium, which were included in the analysis.

Table X: List of Additional Facilities Modeled			
TRI Facility ID	Facility Name	Address	City
48423FRNCN300SO	Fernco Inc.	300 S. Dayton St.	Davison
48458NVRSL1167W	Universal Coating Inc	1167 W. Frances Rd.	Mount Morris
48503CMMRC711W1	Oil Chem Inc.	711 W. 12th St.	Flint
48503MCDNL609CH	McDonald Dairy	609 Chavez Dr.	Flint
48505LCKHR4701T	Lockhart Chemical Co	4302 James P. Cole	Flint
48505PPGND3601J	PPG Industries Inc	3601 James P. Cole	Flint
48506BBPNT2201N	B & B Paint Co	2201 N. Dort Hwy.	Flint
48506MDSTT624KE	Mid State Plating Co Inc	602 Kelso St.	Flint
48550BCFLN902EH	GMC -Buick Motor Div	902 E. Hamilton	Flint
48551GMCTRG3100	GMC Truck & Bus Group	G-3100 Van Slyke Rd.	Flint
48552CPCFLG3248	GM-CPC-Flint Engine Plt	G-3248 Van Slyke Rd	Flint
48553GMCTRG2238	GMC Metal Fabricating Div. Flint	G-2238 W. Bristol Rd	Flint
48554GMSRV6060W	GMC Motor Service Parts Ops.	6060 W. Bristol Rd.	Flint
48555CFLNT300NO	GMC AC Delco Systems Div Wes	300 N. Chevrolet Ave	Flint
48556CSPRK1300N	AC Spark Plug GMC	1300 N. Dort Hwy.	Flint
NA	Genesee Power Station	5300 Energy Drive	Genesee Township

EPA's analysis was performed both with and without Select Steel to examine incremental effects, using an approach that is similar to one developed earlier for Title VI investigations and that is undergoing scientific peer review by EPA's Science Advisory Board ('SAB').¹³ Modifications were made to address suggestions from the SAB.

To determine how permitted air toxic emissions are distributed geographically and on the basis of population subgroups, EPA used 1990 Census data and modeled average air concentrations on a census block level. The TRI air release data used was for 1996, the most recent year for which TRI data is available. The concentrations of chemicals in the various Census blocks were examined relative to known chemical-specific values such as Unit Risk Factors or Reference Concentrations ("RfCs"), and for those chemicals where these values have not yet been established, the *OPPT's Risk Screening Environmental Indicators* (dated April 28, 1998) tables were used. As a conservative screening method, the carcinogenic risk estimates for all carcinogens in each block were added together as an indication of possible cumulative effects on cancer probability.

Because the probability of contracting cancer is not generally assumed to have a threshold level (*i.e.*, there is some probability, however small, at any level of exposure), the decision regarding a level necessary to cause an adverse effect is a matter of policy. In the past, EPA has based regulatory actions at a wide spectrum of levels, generally in the range of 10^{-6} (one in one million) to 10^{-4} (one in ten thousand) lifetime cancer risk.¹⁴ Estimated lifetime individual risks below 10^{-6} have rarely been found to be sufficient basis for action, while in most cases, levels above 10^{-4} have resulted in some form of action, although not necessarily regulation.

Similarly, on the non-cancer side, the 1986 EPA guidelines for dealing with chemical mixtures discusses the concept of hazard index, where a level below 1 means that untoward effects are thought unlikely to occur. Because of the use of safety factors in determining the RfCs used to construct a hazard index, the meaning of a hazard index above 1 cannot be used to predict that unwanted health effects *will* occur. There are usually safety factors of from 3 to 1000 times between calculated RfC levels, which are used as screening thresholds here, and concentrations found to cause adverse effects in animals or humans. Scientists have not agreed, at this point, on a scheme for predicting if and when effects will occur based on the hazard index values between 1 and the lowest concentrations found to cause adverse health effects, often considerably higher.

Major uncertainties in this kind of analysis include the specific chemicals' toxicity potencies, which are not always based on a comparable amount or quality of information, and may include significant "safety factors" to reflect uncertainties in the degree of potency. Other uncertainties include not being able to account for all significant sources, since mobile and area sources of

¹³ The approach presented for SAB review was called the Enhanced Relative Burden Analysis.

¹⁴ See, *e.g.*, CAA § 112(f)(2)(A); 42 U.S.C. § 7412(f)(2)(A).

certain air toxics may be as significant as point sources, especially in urban areas. The point source TRI emissions information used was based on industry-reported data which can be derived using a variety of approaches with varying degrees of accuracy, and in the case of two facilities, the maximum permitted emission levels. In interpreting combined effects of multiple chemical exposures, hazard ratios based on additive combinations of chemicals whose predicted effects are on different parts of the human body may significantly overestimate potential impacts.

Adding carcinogenic risk and construction of hazard indexes for multiple chemicals both involve "adding" various health effect "endpoints" that may result from entirely different biological mechanisms and therefore may not be strictly additive in a biological sense. In this methodology, the chemicals are added as a worst case assumption, and if added levels do not raise concern when compared to benchmarks such as a cancer risk level or a hazard index, an assumption would be that they would not be of concern if a more detailed methodology were applied.

b. Results of Air Toxics Analyses

The analysis focuses on whether the permitted Select Steel emissions either in and of themselves or in combination with other emissions in the area result in concentrations that may adversely impact the health of the residents in the surrounding area. The analysis found that the locations of the blocks with the maximum predicted impacts from the Select Steel Facility were very close in to the facility, near the fence line. None of the Census blocks were found to be significantly adversely impacted solely by projected emissions from the proposed facility. The Census block with the highest projected potential risk from potential carcinogens was estimated to have a lifetime risk of just above 10^{-6} (1 in 1 million) associated with emissions from the proposed facility. The hazard index for all blocks in the six-mile circle due to the Select Steel emissions was well below the screening threshold of 1, the highest block being about 0.03. The analysis does not support, therefore, the allegation that the proposed Select Steel facility emissions themselves, as permitted, will be the cause of health effects in the surrounding area. In addition, the levels from the Select Steel facility are also projected to be fairly low compared to the levels contributed by the other TRI sources collectively.

The cumulative results for the entire six-mile circle indicate the lifetime carcinogenic risk estimates for the highest single block is about 6×10^{-5} . While the estimates for several blocks fall within the 10^{-5} range, these estimates are thought to be quite conservative for the following reason. Virtually all the blocks where risk is above the low 10^{-6} range are dominated by the release of chromium. The methodology makes two very conservative assumptions regarding chromium: first, that all releases are assumed to be the more toxic chromium VI valence state, as opposed to the significantly less toxic chromium III; and second, that the released particles are small enough to be carried with the wind dispersion and not fall to earth and be substantially removed through dry or wet deposition. The ratio of chromium VI to total chromium in emissions is usually much less than 1, with estimates in the 10% range not uncommon. Were this ratio factored into the methodology, none of the blocks would have shown an estimated risk

above the 10^{-6} range. Even so, the conservatively derived levels are not such that they go above the 10^{-4} level.

On the non-cancer side, most of the blocks within the six-mile circle are below the hazard index of 1, even with all non-carcinogenic chemical effects combined. There are a substantial number of blocks, however, which have hazard indexes between one and 10, and someCjust under 6%Cwhich have hazard indexes between 10 and 80. In all of the blocks with hazard indices above 1, glycol ethers¹⁵ is the predominant cause. Therefore, uncertainties that might arise from adding different chemicals together largely do not apply.

There is considerable uncertainty about the meaning of the estimated hazard indices here, for several reasons. First, as previously discussed, scientists have not yet agreed on how to interpret hazard index values above 1. Second, the value used for glycol ethers in this screening methodology was not a formally established RfC, but a value derived from an similar type of toxicity study which used oral rather than inhalation exposure, introducing some additional uncertainty. Third, there are usually uncertainty factors applied to any RfC or reference dose calculation, so values above 1 cannot be easily (or at all) translated into predictions of probabilities of adverse health effects. At this point, these values can be termed "not necessarily safe," but neither can there be adverse health effects definitely predicted upon this basis alone. In any event, the analysis suggests that Select Steel's emissions will contribute minimally, if at all, to the possibility of adverse health effects.

Overall, the EPA analysis does not support the contention that the combined modeled emissions in the six mile area near the proposed facility indicate the likelihood of adverse health impacts. For all of these reasons, with regards to air toxic releases, it is recommended that EPA find no violation of Title VI or EPA's implementing regulations.

4. Dioxin Monitoring

The information gathered from the investigation concerning the monitoring of dioxin emissions is consistent with EAB's analysis of the issue.¹⁶ No performance specifications for CEMS have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source.

¹⁵ Glycol ethers are industrial solvents used in paints and other products.

¹⁶ In the EAB's analysis of Complainants' PSD appeal concerning dioxin monitoring, the Board similarly concluded that "MDEQ's decision is not clearly erroneous." *In re Select Steel Corporation of America*, Docket No. PSD 98-21, at 5 (EAB Sept. 10, 1998). That holding was based, in part, on the fact that the Complainants made "no argument and points out no data to refute MDEQ's judgment." *Id.*

In addition, MDEQ believed dioxins are not emitted by steel recycling mini-mills. EPA has no emissions data for American mini-mills to either support or contradict MDEQ's belief. *The Inventory of Sources of Dioxin in the United States* indicates that information has not yet been developed to determine whether dioxin is a pollutant of concern from facilities like Select Steel.

Furthermore, at this time, EPA does not expect to regulate air toxic emissions from steel recycling mini-mills under CAA section 112. Without regulations or other guidance to direct the Agency's review of this issue, EPA is not in a position to contradict the conclusions of MDEQ.

For these reasons, a finding of no disparate impact associated with MDEQ's decision not to include monitoring requirements for dioxin in the permit is recommended.

B. Allegation Regarding Discrimination in Public Participation

The evidence indicates that the permitting process for the proposed Select Steel facility's PSD permit did not violate Title VI or EPA's implementing regulations. The investigation's results as to each of the allegations are detailed below.

1. Timing of Permit Issuance

EPA reviewed a variety of documents from MDEQ concerning the timing of the permitting process for the proposed Select Steel facility and interviewed the MDEQ employees who participated in that process. Neither the documents nor the interviews revealed anything indicating that MDEQ expedited the permitting process for Select Steel in order to preempt an adverse holding in the GPS case or for any other improper reason. In addition, EPA's review found that the public participation process for the permit was not compromised by the pace of the permitting process.

The five months that lapsed between the submission of the permit application and the issuance of the permit appears to be normal. Among the last twenty-six PSD permits approved by MDEQ, the average time between receipt of the application and approval of the permit was eight months, but the average time between the receipt of a complete application and approval was only one and a half months. Message transmitted by facsimile from Lynn Fiedler to Richard Ida, at 4 (Oct. 28, 1998) (providing table of PSD permit processing times for last three years). Judging by those averages, delays that may occur in the issuance of PSD permits could be attributed to incomplete applications. In this case, significant pre-application discussions occurred before the application was received on December 30, 1997. *See, e.g.*, Memorandum from Lynn Fiedler to the file (December 8, 1997). As a result, MDEQ was able to perform a completeness determination the same day the application was submitted, thereby shortening the time required to process the application.

In addition, during a pre-application meeting with Select Steel on December 2, 1997, rather than attempting to ignore the Circuit Court's holding in the GPS litigation, the Thermal Process Unit Supervisor said she provided a copy of the decision to the applicants. She went on to note that MDEQ "is a neutral party and . . . we would be following the process as required by the state and federal regulations." Memorandum from Lynn Fiedler to the file (December 8, 1997).

Although Complainants may have gotten the initial impression that the permit process would take over one year based on Ms. Fiedler's alleged comment that it would take "a long time," subsequent communication between Complainants and MDEQ should have clarified the timetable for Complainants. On February 17, 1998, Fr. Schmitter and Ms. Fiedler discussed the timing of the hearing. Ms. Fiedler indicated that it would be at least 30-45 days away. Notes from Lynn Fiedler (Feb. 17, 1998).

Moreover, nothing in the public participation process was compromised by the pace of the permit process. MDEQ satisfied EPA's regulatory requirements concerning the issuance of PSD permits. *See infra* discussion about notice and location of public hearing. For all of these reasons, it is recommended that EPA find that the circumstances surrounding the timing of the Select Steel PSD permit issuance did not violate Title VI or EPA's implementing regulations.

2. Relationship Between Select Steel and MDEQ

EPA reviewed a variety of documents from MDEQ concerning the relationship between MDEQ and Mr. Shah, and interviewed the MDEQ employees who participated in the permitting process. Neither the documents nor the interviews revealed anything indicating improper or unlawful actions by the MDEQ, NTH Consultants, or Mr. Shah in their interactions during the permitting of Select Steel. Some MDEQ employees, including Dennis Drake, Director, MDEQ Air Quality Division, noted their awareness of Mr. Shah's job with NTH Consultants, but were not aware that Mr. Shah was involved in the Select Steel application. Interview with Dennis Drake (October 21, 1998). Those MDEQ employees who knew about Mr. Shah's role in developing the Select Steel permit, including Hien Nguyen, Permit Engineer, and Lynn Fiedler, stated that no special treatment was given to Mr. Shah or to the Select Steel permit application. Interview with Hien Nguyen and Lynn Fiedler (October 21, 1998).

In some government organizations, regulations prescribe certain limitations on post-employment interactions with the former government employee. In this case, Michigan does not appear to have any such regulation. *See, e.g.*, Mich. Stat. Ann. Title 4, Part 7, Chapter 31c (1998) (Standards of Conduct); Michigan Civil Service Commission Rules § 2-12 (Retirement) and § 2-21 (Conflict of Interest). Notwithstanding the absence of state regulations, the circumstances of this situation do not indicate any impropriety. Mr. Shah was never involved in the permitting of the Select Steel facility during his tenure at MDEQ because he resigned from MDEQ approximately two years prior to the submission of Select Steel's application. Telephone Interview with Dhruvan Shah (Oct. 23, 1998). Furthermore, even if the federal rules concerning subsequent employment had applied to this situation, Mr. Shah would have been free to participate in the Select Steel permit. *See* 5 C.F.R. §§ 2637.201 to 2637.204 (regulations concerning post-employment conflict of interest).

Without some evidence of impropriety in the relationship between the permit authority and the permittee, EPA cannot assume that any such impropriety existed. Accordingly, it is recommended that EPA find that nothing about the relationship between MDEQ, Select Steel, NTH Consultants, and Mr. Shah violated Title VI or its implementing regulations.

3. Notice of Public Hearing

EPA reviewed a variety of documents from MDEQ concerning the notice provided for the public hearing and interviewed the MDEQ employees who were involved in providing that notice. Neither the documents nor the interviews revealed anything indicating a violation of Title VI of

the Civil Rights Act of 1964, as amended, or EPA implementing regulation, by the MDEQ in providing notice for the public hearing.

EPA's regulations for PSD permitting require that notice of a public hearing must be published in a weekly or daily newspaper within the affected area. 40 C.F.R. § 124.10(c)(2)(i). In this case, MDEQ went beyond the requirements of the regulation and published notices about the hearing in three local newspapers: The Flint Journal on March 26, 1998, and March 27, 1998; The Suburban News on March 29, 1998; and The Genesee County Herald on April 1, 1998.

EPA's regulations also require that notice be mailed to certain interested community members. 40 C.F.R. § 124.10(c)(1)(ix). MDEQ mailed letters dated March 25, 1998 to Fr. Schmitter, Sr. Chiaverini, and nine other individuals in the community who had expressed interest in the permit. That letter was also transmitted by facsimile machine to Fr. Schmitter and Sr. Chiaverini on March 25, 1998. Nonetheless, Complainants believed that MDEQ should have mailed the notice to more members of the community, particularly in light of the alleged inadequacy of the notice mentioned in the GPS case. MDEQ, however, believed that Fr. Schmitter and Sr. Chiaverini would act as the contact point for their community and alert other interested parties about the proceedings. Interview with Lynn Fiedler (Oct. 21, 1998). More importantly, the mailing list prepared by MDEQ included individuals who had expressed interest in the Select Steel permit application and who had participated in other permitting decisions that involved the area, consistent with the requirements of EPA's regulations. *See* Select Steel Mailing List (undated).

The information examined during the investigation indicates that MDEQ provided sufficient notice of its public hearing. In terms of newspaper publication, MDEQ went beyond the requirements of EPA's regulations and issued the notice in three, rather than just one, local newspapers. The mailing list that MDEQ developed also met EPA's requirements and was not inadequate to inform the community about the public hearing, in part, because the Complainants took it upon themselves to contact other members of the community. Consequently, it is recommended that EPA find that the method of notification for the public hearing did not violate Title VI or its implementing regulation.

4. Location of Public Hearing

EPA reviewed a variety of documents from MDEQ concerning the location of the public hearing and interviewed the MDEQ employees who were involved in selecting that location. Neither the documents nor the interviews revealed anything indicating a violation of Title VI of the Civil Rights Act of 1964, as amended, or EPA implementing regulation, by the MDEQ in selecting a location for the public hearing.

Complainants wanted the hearing held at Carpenter Road Elementary School. It is not clear whether MDEQ contacted the school in its search for a hearing site. A MDEQ memorandum indicates that "there would be . . . a public hearing in the local area - either Carpenter Road school or another school close to the facility." Memorandum from Lynn Fiedler to the file (Dec. 8,

1997). The Air Quality Division Hearing Officer indicated that she contacted the Carpenter Road School. Interview with Susan Robertson (Oct. 21, 1998). The Principal of Carpenter Road Elementary School, however, has no recollection of being contacted about such a hearing and said that he normally welcomes such events. Telephone Interview with Charles Atwater (Oct. 23, 1998).

MDEQ contacted the Beecher High School and its feeder schools. Telephone Interview with Judy Williams, Parent Involvement Coordinator, Beecher School District (Oct. 26, 1998). MDEQ ultimately held the public hearing at Mount Morris High School, approximately two miles from the proposed facility.

Notwithstanding the uncertainty about Carpenter Road Elementary School, the location chosen for the public hearing is in close proximity to the proposed site. In addition, it is accessible by the general public. The Genesee County Metropolitan Transit Authority provides public transportation (*e.g.*, “Your Ride”) to the location. Telephone Interview with Ronda Jenkins, Customer Service Representative, Genesee County Mass Transit Authority (Oct. 28, 1998). It is recommended that EPA find that MDEQ’s decision to host the hearing at Mount Morris High School does not raise to the level of a violation of Title VI or its regulations.

C. Conclusion

Having analyzed all of the materials submitted and information gathered during the investigation regarding each allegation, it is recommended that EPA not find any violations of Title VI and EPA’s implementing regulations by MDEQ.